



# STATE OF INDIANA

**MICHAEL R. PENCE, Governor**

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February 20, 2015

Sean S. McDevitt  
66-10 Thornton Place #4E  
Rego Park, NY 11374

*Re: Formal Complaint 15-FC-17; Alleged Violation of the Access to Public Records Act by the Indiana State Police*

Dear Mr. McDevitt,

This advisory opinion is in response to your formal complaint alleging the Indiana State Police ("ISP") violated the Access to Public Records Act ("APRA"), Ind. Code § 5-14-3-1 *et. seq.* The ISP has responded via Ms. Cynthia Forbes, Esq. Her response is enclosed for your review. Pursuant to Ind. Code § 5-14-5-10, I issue the following opinion to your formal complaint received by the Office of the Public Access Counselor on January 21, 2015.

## **BACKGROUND**

Your complaint dated January 21, 2014 alleges the Indiana State Police violated the Access to Public Records Act by not providing records responsive to your request in violation of Ind. Code § 5-14-3-3(b).

On December 16, 2014, you submitted to the ISP a public records request seeking access to a copy of records related to the 1972 Bull Island rockfest (a.k.a. the Erie Canal Soda Pop Festival and the Labor Day Soda Pop Festival), particularly an unedited copy of a video recording taken by the ISP.

On December 17, 2014, Capt. Dave Bursten responded to your request by email, denying access to the records. The ISP maintained the records sought relate to investigatory records and fall under an exemption Ind. Code § 5-14-3-4(b)(1). You also take exception with the categorization of the records as investigatory as the ISP did not have jurisdiction over Bull Island; it is Illinois territory.

On February 3, 2015, legal counsel for ISP, Ms. Cynthia Forbes acknowledges the ISP is a public agency for the purposes of the APRA. However, counsel affirms Capt. Bursten's denial on the grounds the information requested is part of investigatory records. The ISP

has denied any institutional knowledge the film had been shown in the past, however, you have provided an Indiana State Police bulletin from 1973 announcing the film had been shown 249 times to a total of 30,000 people from 1970-1973.

ISP has also determined the video displays many scenes of illicit activity. The release of the video could “result in possible civil action against the State” by those individuals recorded. ISP has used its discretion to withhold the record on the basis the harm of disclosure outweighs public interest.

## ANALYSIS

The public policy of the APRA states that “(p)roviding persons with information is an essential function of a representative government and an integral part of the routine duties of public officials and employees, whose duty it is to provide the information.” See Ind. Code § 5-14-3-1. The Indiana State Police is a public agency for the purposes of the APRA. See Ind. Code § 5-14-3-2(n)(1). Accordingly, any person has the right to inspect and copy ISP’s public records during regular business hours unless the records are protected from disclosure as confidential or otherwise exempt under the APRA. See Ind. Code § 5-14- 3-3(a).

Indiana Code § 5-14-3-4(b)(1) provides that a law enforcement agency has discretion over the disclosure of investigatory records. While I believe the information you request falls under the category of investigatory records as it was originally compiled in the course of an investigation of a crime (or for crime prevention purposes), the nature of the record changed course after it was displayed multiple times to the public.

I do not agree with ISP’s argument a record does not lose its status for discretionary release just because it has been released in one capacity at a point in time. To release to one group or groups, but deny others could be viewed as arbitrary and capricious. Without a compelling reason for doing so, if a record is intentionally released as a disclosable public record, then an agency can no longer exercise that particular discretion *ex post facto*. From the information provided in the form of the State Police newsletter from 1973, it is clear the video has been shown many times to interested members of the public.

Release to a court or other law enforcement agency in the investigation process notwithstanding, a record is deemed disclosable once released as a public record. The bell, as it is said, cannot be un-rung. The ISP clearly demonstrated the video as a cautionary depiction of illegality in the past and has therefore consented to its release.

ISP also argues:

“ISP determined that significant portions of the video display images of illicit drug use, nudity, and sexual intercourse occurring at the festival. The individuals engaged in these activities could result in possible civil action against the State by these individuals. ISP scrutinized its decision

and used our discretion to withhold the record as investigatory, and believes that the harm of disclosure outweighs the public interest of transparency in this case.”

The Access to Public Records Act does not have a privacy clause with the exception of narrow exceptions such as social security numbers and confidential financial information. Embarrassment of individuals voluntarily engaging in illegal and illicit acts is not an exception to disclosure. Likewise, the mere threat of a lawsuit is not an exception either. Moreover, the proposition a lawsuit would be successful is dubious as there is no expectation of privacy for engaging in lewd or illegal acts in public.

### **CONCLUSION**

Based on the foregoing, it is the Opinion of the Public Access Counselor the Indiana State Police should release the entirety of the Bull Island video upon request.

Regards,

A handwritten signature in black ink, appearing to be 'LHB', written in a cursive, stylized manner.

Luke H. Britt  
Public Access Counselor

Cc: Ms. Cynthia Forbes, Esq.